APPENDIX A

Opinion of the Circuit Court of the Tenth Judicial Circuit of Illinois

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL
CIRCUIT OF ILLINOIS
PEORIA COUNTY
GENERAL DIVISION II

Case No. 64-E-3405

COMMERCIAL NATIONAL BANK OF PEORIA, *Plaintiff*,

v.

CLARESA F. ARMSTRONG BROWN, ET AL., *Defendant*,

and

CLARESA F. M. BROWN, *Cross Plaintiff*,

v.

COMMERCIAL NATIONAL BANK OF PEORIA, *Cross Defendant*.

Opinion

The Court having heard the testimony of witnesses examined under oath in open Court and, by stipulation of Counsel, having read evidence depositions of witnesses whose sworn testimony was taken prior to the trial and having received into evidence numerous written documents and exhibits and having given same full consideration without making a special finding of evidentiary facts, now expresses an opinion concerning the ultimate facts in issue in the above litigation.

It is the opinion of the Court that at the time of the execution of the 1960 Trust for the benefit of three of her grandchildren and the 1962 Trusts for her children and grandchildren Clara Kempshall Meyer was mentally competent and able to appreciate and understand the pro-

visions of each of the trust agreements. In support of this the Court has taken into consideration the settlor's background as a business woman, which extended over the bulk of her lifetime, her wide knowledge and experience in stocks and investments including business buildings, and her experience in dealing with trusts for her benefit with remainder to her children since 1946, the latter also having been amended in 1960, which amendment is not challenged. The settlor was not only capable, based upon her past experience, but was actively managing her business affairs in the purchase and sale of securities and was an active Director of the Central National Bank until its consolidation in the fall of 1961 when she retired from both a business life and bank directorship. Her mental capacity at the time of the execution of each of these trusts was completely supported by the testimony of witnesses produced who had known her in a business and personal way over a period of many years and also by the testimony of Frank C. Mayne, Jr., who was the only person present at the signing of both trusts who is now living, and the testimony of Boyd F. Goldsworthy, who was the only other person present in the preliminary conferences and at the signing of the 1962 trusts. Frank C. Mayne, Jr. also took part in the conferences leading up to the execution of each of the trusts. This testimony indicates that on those dates the settlor was capable of and did understand the nature and extent of her property, the natural objects of her bounty and the nature and terms of the trust instruments which she executed.

The Counterclaimant Claresa F. Armstrong Brown attempted to offset this testimony by circumstantial evidence, although stating throughout the piece that her mother was "competent" (capable of managing the ordinary affairs of life) but in a weakened condition on each of the dates in question. Although voluminous, this evidence may be grouped in about six areas, namely, medical reports and hospital records of arteriosclerosis and general physical

decline; systematic borrowing at the bank in lieu of liquidation of assets; placing $9,000 in Government bonds in the name of settlor with the right of survivorship to officers and employees of the bank; testimony of Claresa and several casual acquaintances of the decedent from Chicago that the settlor was failing in both mental and physical health in the fall of 1961; the occasional failure over the years to deposit dividend checks and improperly drawing personal checks with minor omissions; occasional forgetfulness of anniversary dates, the death of a son-in-law and other matters; and several idiosyncrasies.

It is the opinion of the Court that the testimony of the Counterclaimant does not sustain a position showing that the settlor was either incompetent or in such a weakened mental condition that she could be easily influenced or that she was in a subservient position to the officers and employees of the bank or to her son or daughter at the time of the execution of these trusts.

The second principal issue surrounds that of the acknowledged fiduciary relationship which existed between the Commercial National Bank of Peoria in the 1962 trusts and the Central National Bank of Peoria in the 1960 trust and the settlor and, also, between her son and daughter and the settlor at the time of the execution of these trusts. It has been the position of the Counterclaimant that because of the fiduciary relationship the trust could not be valid unless the settlor had independent legal counsel prior to and at the time of the signing of the trust agreements. Counterclaimant rules out this status on the part of John M. Elliott who had been on a personal retainer from settlor for many years because he was also on a retainer from the Trust Department of the Central National Bank in connection with the 1960 trust. It is also argued that Boyd F. Goldsworthy, who advised settlor and drafted the 1962 trusts, was equally disqualified as a shareholder of the Central National Bank and later the Commercial

National Bank of Peoria after the consolidation and because he had been and was the personal attorney for Richard Kempshall Meyer, Sr., son of the settlor.

In the opinion of the Court the law requires that where there is a fiduciary relationship and there is a conveyance to the fiduciary that there will be a presumption of fraud or undue influence, (1) if the fiduciary is a beneficiary in the transaction, and (2) it is shown that the fiduciary procured the transaction for its own benefit, and (3) that the grantor or settlor did not receive a full disclosure of facts and did not have independent advice. In the instant case there is a factual difference from the reported Illinois cases in that no advantage came to the fiduciary, here, except that it was named as trustee of an irrevocable trust and could anticipate the usual management fees for the lifetime of the primary beneficiaries, the children of the settlor. It is noteworthy that the trustee received no outright gift or grant and the trust instrument itself contained adequate control over the management, investment and ultimate vesting of the trust res. The case at bar is clearly distinguishable on its facts and the terms of the agreement from *Harrison* v. *City National Bank of Clinton, Iowa,* 210 Fed. Supp. 362, a district court case relied on by Counterclaimant.

Neither is it the type of circumstance where the trustee or fiduciary sought out a comparative stranger and convinced her to enter into a trust agreement. To the contrary, the record shows that the father of the settlor was an early President of the Central National Bank; that her mother inherited and passed along to settlor the largest single holding in the ownership of shares of that bank; that settlor's mother and later the settlor served as Directors of the bank, actively managing its affairs and that the settlor was, also, an inactive vice president of the bank until its merger with the Commercial National Bank in late 1961. The settlor used the bank as her headquarters

in a private business, that of investing securities. Her business prowess is evidenced by the fact that numerous witnesses testified in reviewing her portfolio that she had made excellent investments at the right time and is further evidenced by the fact that she managed to accumulate investments in excess of $5,000,000, which ultimately were scattered over four trusts and her probate estate at the time of her death. She knew almost every employee in the bank on a first name basis and they were at her beck and call. The 1960 trust was drawn with the cooperation of the trust officer (whom she, as a major stockholder, could apparently have had discharged had she so wished); with the cooperation of an attorney she had trusted and respected for several decades and who was on a substantial retainer from her and who was also on retainer from the Trust Department of her bank. The 1962 trusts were drawn by Boyd F. Goldsworthy with whom she had had a personal acquaintance over a period of at least 10 years and who had worked with her son Richard, her agent in the management of certain buildings which she owned in the City of Peoria. The element of gift, gain or unequal position on the part of the settlor and the trustee are absent as established by the greater weight of the evidence.

The relationship between the settlor and her son Richard Kempshall Meyer, Sr., and, indeed, with her daughter Claresa F. Armstrong Brown should also be examined in relation to these trusts to determine whether or not a fiduciary relationship existed and whether they as the direct or indirect beneficiaries, played any roll in obtaining these gifts in trust. The testimony is uncontradicted that neither of her children knew of the grandchildren's trust of 1960 until after it was executed. Richard first became aware of it when he was ready to send his older son to college a year or two after its creation and Claresa learned of it shortly thereafter from one of her nephews. A draft of the 1962 trust was given to each of the children prior

to its execution and they both examined it, reviewed it at length and discussed it in Claresa's apartment in early December 1961, about a month before its execution. At that time it had not been disclosed to them or either of them the nature or extent of the funds which would go into the trusts. No schedule of property was attached and the only reference to money was to the $50,000 gift to Claresa which could be withdrawn at once (if she desired to purchase an apartment). Neither of the children learned from the trustee or the scrivener anything about the nature and extent of the gift in trust until after it had been executed and copies were furnished to them for their advice. Both were amazed at the size of the gifts. Under these circumstances the evidence is conclusive that neither of the children did or could have influenced the settlor in the execution of the instruments or in the designation of the nature or extent of the funds to be placed in trust.

Assuming for the moment, however, that the trustee might be considered to be a beneficiary because of the management fees it could anticipate, it is the opinion of the Court that the settlor had capable and adequate independent legal counsel of her own choosing. Not only were John M. Elliott and Boyd F. Goldsworthy honest local attorneys, but both of them specialized in estate planning and enjoyed an excellent reputation in the community and among the members of their profession. It is apparent from the evidence that because of the age and physical infirmities of Mr. Elliott in 1961 and problems in handling Mrs. Meyer's Income Tax for the tax years 1957-1958 that she elected to obtain the services of Mr. Goldsworthy. It was not until after the January 1962 trusts were drawn in the fall of 1961 to be signed in January of 1962 and all of the conferences with Boyd F. Goldsworthy had been held that Mrs. Meyer reluctantly, upon receiving Mr. Elliott's statement for $600, decided to stop the annual retainer as a matter of economy. There is no evidence to support any conspiracy or plan on the part of Richard Kempshall

Meyer, Sr., Boyd F. Goldsworthy and/or Frank C. Mayne, Jr., to dismiss the services of John M. Elliott on any theory. It is noteworthy that, even though these men were capable in their field and recognized in the local area as experts in estate planning, their work was in part reviewed and verified by a firm of tax and estate planning specialists in Chicago.

It is further the opinion of the Court that the basic idea for both the 1960 and the 1962 trusts was initiated by Clara Kempshall Meyer and not by the trustee or either of the children and certainly not by any of the grandchildren and the trusts were not "procured" by the bank out of self-interest. The trusts were motivated by sound business and personal reasons and to meet present problems which then existed. The trusts were not made in anticipation of death and constituted good sound estate plans. At all times the bank, its officers, agents, and employees who had contact with Mrs. Meyer exercised toward her and exhibited the utmost good faith and made full disclosure of all facts available to them.

It is further the opinion of the Court that the Counterclaimant was aware indirectly or by hearsay of the grandchildren's 1960 trust at least two years before her mother passed away in February 1964. As co-executor she had available to her a copy of that trust shortly after her mother's death. She was aware of the 1962 trust for both her and her brother about a month before they were signed and participated actively in withdrawing $50,000 in funds from her 1962 trust to invest in an apartment in Chicago for her own use, withdrew an additional $1,000 in principal and collaborated frequently with the trustee concerning the nature and form of investment of the trust res and obtained a substantial change to increase her tax free income. It was not until she found she could not completely dominate the form of the investment of her 1962 trust and could not withdraw the principal for her

own use that a decision was made in 1965 to attempt to set aside the trust. She then tendered back her benefits if ordered by the final decree. She was aware of these facts at a time when she had full advice and collaboration of legal counsel and a private auditor of her own choosing. Her apparent and obvious motives, also, largely discredit much of her testimony. However, in light of the findings on the other issues which dispose of this case, it is unnecessary to enter a ruling in the affirmative defense, estoppel.

The trustee has made an accounting in the 1962 trust and has filed current reports, copies of which have been received by the beneficiaries. No testimony was presented in opposition to these reports, they have been examined by the Court and should be approved as filed.

As indicated above, the reason for the filing of the Complaint to establish the trusts in Court in the first instance was because of a difference of opinion between the trustee and the Counterclaimant concerning the investment policies followed by the bank. It is apparent from reading the trust instrument itself that the trust management and investment provisions are broad and that there is a strong retention clause concerning the Aetna Insurance Company stock which was originally the only item in the trust when created by the settlor. There was a sentimental as well as a practical reason for the long ownership and retention of Aetna stock in the Meyer family and, as frequently argued by Counterclaimant, it had an almost zero cost base in Claresa's trust. It has been a growth stock, the original cost being under $30,000 and the value at the time of the creation of the trust was approximately $540,000. There is always a divergence of interest between a life beneficiary and a remainderman, the life beneficiary desiring high income net yield investments without regard to the growth possibilities and the remainderman desiring high growth investments with little

regard to current dividends. The trustee has attempted to balance, through diversification of investments, both the growth and immediate income possibilities of this portfolio and has done so within the provisions of the trust instrument. In the opinion of the Court the investment policies as exercised by the bank should be approved.

Finally, it is the opinion of the Court that the equities in this matter are, in all respects, with the Plaintiff and the Counterdefendants and against the Counterclaimant. A decree should be prepared finding both the 1960 and the 1962 trusts valid and establishing the 1962 trusts under the supervision of the Court with reports to be prepared, filed and submitted to the Court for its approval annually, upon notice to the beneficiaries, until further Order of the Court.

The trustee is entitled to its usual and customary fees for the management of the trusts under its supervision and is also entitled, along with its attorney, to fees for extraordinary service in the defense of the Counterclaim in this law suit, said fees to be determined and assessed by the Court upon further hearing. Similarly, the Guardian ad Litem and Counsel for the Counterdefendants are entitled to reasonable fees to be determined and assessed by the Court upon further hearing.

Counsel for Plaintiff will prepare a decree accordingly.

/s/ ROBERT E. HUNT
Judge

APPENDIX B

Opinion of the Appellate Court (Third District)
State of Illinois

Case No. 67-16

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D. 1968

CLARESA F. ARMSTRONG BROWN, Defendant, Cross-Complainant, Counterclaimant, Appellant and Cross-Appellee,

v.

COMMERCIAL NATIONAL BANK OF PEORIA, a National Banking Association, as Trustee, etc., et al., Plaintiff, Cross-Defendants, Appellees and Cross-Appellants.

Appeal From the Circuit Court of the 10th Judicial Circuit of Illinois, Peoria County, General Division 11

Honorable Robert E. Hunt, Judge Presiding.

STOUDER, J.

This case, arising from the Circuit Court of Peoria County, involves the validity of three inter vivos irrevocable trusts created by Clara K. Meyer, now deceased.

The Settlor was a major stockholder and depositor with the Commercial National Bank of Peoria, had been on the board of directors prior to the consolidation which resulted in the establishment of Appellee Bank in its present form in 1961 and had engaged in many business dealings with the bank over a long period of time. In 1946, Clara Meyer created a revocable trust naming the bank as trustee which trust was in effect at the date of the Settlor's death but is not involved in this litigation. In 1960, the Settlor created an irrevocable trust, the Appellee bank being trustee, her grandchildren being the principal

beneficiaries and referred to herein as the grandchildrens' trust. Two other irrevocable trusts were created in January, 1962, designating the bank as trustee, her son Richard Meyer being the principal beneficiary of one trust, herein referred to as the Richard trust and her daughter, Claresa Armstrong Brown, being the principal beneficiary of the other trust, herein referred to as the Claresa trust. Securities from the 1946 revocable trust were transferred to the three irrevocable trusts. Clara Meyer, at the age of 87, died testate, February 19, 1964.

A disagreement between the bank and Claresa resulted in the commencement of this suit by the bank for approval of its accounts and investment policies. An order was entered from which no appeal has been taken and we are not concerned with such order in this appeal. Claresa Brown counter-claimed against the bank as trustee and the beneficiaries of the three irrevocable trusts seeking to set aside such trusts. The issues created by the counter-claim were determined by the court sitting without a jury and resulted in an order dismissing the counter-claim for want of equity. This appeal follows. The trial court also fixed and allowed trustee's fees and fees for the attorneys of the trustee and the beneficiaries allocating such costs against the principal of the three trusts involved. Although no question is raised concerning the reasonableness of the fees allowed, the bank as trustee and the beneficiaries have cross appealed questioning the propriety of assessing such fees against the principal of the trusts rather than against the income of Claresa Brown.

The allegations of the counter-claim are in substance that Clara Meyer was mentally and physically enfeebled by old age and cerebral arteriosclerosis; that a fiduciary relationship existed between the bank and Clara Meyer at the time the trust agreements were executed, the bank exercising a dominant influence with respect to Clara Meyer's enfeebled condition; that Clara Meyer did not

understand the trust agreements entered into; that she did not receive independent legal advice concerning such agreements and that the bank conspired with Richard Meyer to deprive Clara Meyer of independent legal advice. It should be noted that the counter-claim does not allege actual fraud or mistake.

The evidence, which is voluminous, was presented during hearings lasting nearly four weeks and relates primarily to two issues, the circumstances of the execution of the trust agreements and the mental and physical condition of Clara Meyer.

The Settlor was advised in legal matters up to and including the time of execution of the grandchildrens' trust in 1960 by one John M. Elliot, an attorney. However when the Claresa and Richard trusts were executed in 1962, the only attorney involved was a Boyd Goldsworthy. Mr. Goldsworthy had been Richard's attorney in other matters and the evidence is conflicting as to whether the Settlor requested to have Mr. Goldsworthy represent her or whether she indicated any desire to have other representation or exactly whom Mr. Goldsworthy did represent. It does appear that Goldsworthy conferred with Clara Meyer prior to the execution of the Richard and Claresa trusts although an officer of the bank was also present. It also appears that Goldsworthy submitted his bill for services to Clara Meyer which bill was paid. Furthermore it can be said that there is little evidence from which it can be inferred that with respect to the trust agreements, Goldsworthy represented anyone other than Clara Meyer. The evidence is also in dispute as to how thoroughly the Settlor understood the somewhat involved trust instruments.

Claresa was acquainted with the terms of the trust agreement, a copy of the Claresa trust was made available to her and her attorney and she took advantage of some of

the trust benefits both prior and subsequent to the death of the Settlor.

The mental capacity of the Settlor is also in dispute. Appellant makes no claim that the Settlor was mentally incompetent prior to 1963 but, as we understand her argument, that Settlor's mental ability was progressively impaired due to cerebral arteriosclerosis over a long period of time resulting in incompetency sometime in 1963 and death in February of 1964. The evidence also shows that the Settlor was a director of the bank until the 1961 consolidation, regularly attended meetings and conducted her own business affairs as well as some for her daughter until sometime in 1962 after the execution of the Claresa and Richard trusts.

While appellant alleges that Richard conspired with the bank to accomplish the execution of the trusts, the record does not factually support such allegation nor does appellant make further argument on this point.

In order that these trusts may be set aside it must be shown either that the Settlor was incompetent at the time they were executed or that a fiduciary relationship existed between the bank, or one of the beneficiaries, and the Settlor, that the person other than the Settlor was the dominant party and by unfair tactics induced the Settlor to enter into a transaction from which the dominant party appears to gain at the expense of the dependent party. Works v. McNeil, 1 Ill. 2d 47, 115 N.E. 2d 320, Turner v. Black, 19 Ill. 2d 296, 166 N.E. 2d 588 and Boryca v. Parry, 24 Ill. 2d 320, 181 N.E. 2d 124.

Appellant's facts concerning senility being a progressive attribute of human nature are most interesting or would be had there been considerably fewer of them. However this court is fully prepared to recognize the fact that senility accompanies life, that it is indeed progressive and, in fact begins with the onset of life and progresses until

life is terminated. Unfortunately Appellants' voluminous facts, figures, documents and charts failed to establish the Settlor's incompetence prior to 1963.

Appellant, herself a psychiatrist, makes no claim that the Settlor was legally incompetent at the time the trusts were executed but only that the mental ability of the Settlor had become so impaired by senility that she depended upon the bank for advice in business matters and could not understand the import of the trust agreements without independent, competent legal advice. This argument itself assumes that the Settlor was capable of understanding advice and counsel albeit from someone other than the bank. Accordingly we do not believe the trusts can be deemed invalid on account of the Settlor's incompetency.

This leaves us with the following argument for appellant. The relationship between the bank and the Settlor was a fiduciary relationship. The bank was the dominant party due to the mental impairment of the Settlor and that the bank induced the execution of the trust agreements for its own gain. Based on these propositions, appellant would have this court announce as a rule of law that in any case where a fiduciary relationship exists and the parties to the relationship enter into a business transaction, that transaction must be set aside unless the transaction be affirmatively shown to be fair by proof that the dependent party was represented by independent legal counsel. This we do not conceive to be the law of this state nor are we prepared to announce it as such in this case.

It is true that where a fiduciary relationship exists and a transaction is entered into whereby the dominant party appears to gain at the expense of the dependent party, the transaction will be deemed presumptively fraudulent and will be set aside unless the one in whom trust and confidence is reposed establishes its fairness by clear and

convincing proof. Clark v. Clark, 398 Ill. 592, 76 N.E. 2d 446 and Works v. McNeil, 1 Ill. 2d 47, 115 N.E. 2d 320. It is also true that one method of establishing the fairness of such a transaction would be to show that the dependent party was represented by independent legal counsel. However this is not to say that having established the existence of a fiduciary relationship the burden is then upon the dominant party to establish the fairness of any or all transactions between the parties to the relationship.

We are not disposed to quibble about the question of whether Appellee Bank, or any of its officers, by virtue of being a professional fiduciary in its capacity as trustee, thereby was a fiduciary in any other capacity since the bank has conceded the relationship. Having shown the relationship however, appellant's burden does not then shift to appellee for appellant must also affirmatively show that appellee was the dominant party and that it gained from the trust agreement at the expense of the Settlor. There is no evidence in the record from which it can be inferred that the bank received any gain or benefit other than the compensation for its services as a professional trustee. This cannot be the kind of gain contemplated by the above rule for to so hold would mean an invitation never to pay any professional fiduciary for his services since such payment would thereby render the transaction presumptively fraudulent. Nor can it even be inferred from the evidence that the trust agreements were disadvantageous to the Settlor. At best the trust agreements minimized her potential federal estate tax and any disadvantage accrued not to the Settlor but to the appellant. Accordingly we believe appellant has failed to establish facts warranting the application of the presumptive fraud rule applicable to fiduciary relationships and hence the trusts are not invalid for this reason.

This brings us to the cross-appeal of the bank and the trust beneficiaries not including Claresa Brown, in which

it is contended that the court erred in assessing other costs against the principal of the trusts. No question is raised concerning the allowability, reasonableness or allocation among the trusts involved. It is argued by the bank and beneficiaries that such fees should have been assessed against Claresa Brown or her income from the Claresa trust. The general rule is that expenses incident to the preservation of a trust or for the benefit thereof are properly chargeable against and reimbursable from the trust estate. Kerner v. Peterson, 368 Ill. 59, 12 N.E. 2d 884 and Patterson v. Northern Trust Company, 286 Ill. 564, 122 N.E. 55. Such rule does not condition the assessment of fees and costs dependent upon the outcome of the litigation and does not require that such fees and costs be assessed against the unsuccessful party. Although costs may be assessed against the unsuccessful party where it appears the claim asserted was groundless, vexatious or for the purpose of harassment, we believe the record demonstrates that a bona fide dispute existed and consequently we find no error in the trial court's assessment of fees and costs against the trust estates.

For the foregoing reasons the decrees of the Circuit Court of Peoria County are affirmed.

DECREES AFFIRMED.

ALLOY, P. J., and
SCHEINEMAN, J. concur.

APPENDIX C

Opinion of Supreme Court of Illinois

Docket No. 41515—Agenda 32—January, 1969.

CLARESA F. ARMSTRONG BROWN, Appellant,

v.

COMMERCIAL NATIONAL BANK OF PEORIA *et al.*, Appellees.

MR. JUSTICE KLINGBIEL delivered the opinion of the court:

The Commercial National Bank of Peoria, as trustee, filed a complaint in the circuit court of Peoria County seeking approval of its accounts and investment policy with respect to two irrevocable trusts established in 1962 by Clara K. Meyer, since deceased. A counterclaim was filed by her daughter, Claresa Armstrong Brown, the principal beneficiary under one of the trusts. The counterclaim seeks to set aside both trusts together with a third one made in 1960, on the ground of undue influence on the part of the bank. After extensive hearings a decree was entered dismissing the counterclaim and approving the trustee's reports. The decree was affirmed by the appellate court (94 Ill. App. 2d 373), and we have allowed the daughter's petition for leave to appeal from the appellate court's judgment. The sole question is whether the circuit court erred in refusing to set aside the trusts.

The settlor, 85 years of age when the 1962 trusts were set up, had been divorced from her husband in 1933 and never remarried. She had two children: Richard, born in 1909, and Claresa, the appellant, born in 1916. Richard had four children, while Claresa had none. The 1960 trust was set up primarily for the settlor's grandchildren, and the two 1962 trusts were created for Richard and Claresa respectively. Under Richard's trust he was to receive the income for life, with the corpus to be distributed on his death to his descendants. Claresa's trust provided for

one-half the income to be paid to her, and the remaining half to be paid her in the trustee's discretion, should she require it, with a power of appointment in her over any portions of the income accumulated. The corpus was payable after her death to her children if any and if none then to Richard's children. The trust also provided for a lump sum payment of $50,000 as Claresa should desire, and this sum in fact was paid to her shortly thereafter when she purchased a co-operative apartment in Chicago, where she resided.

The evidence shows the settlor to have been a capable woman in the management of business affairs, having long experience in dealing with her stocks and other investments. She was an active director of the Central National Bank until its consolidation with the appellee bank in 1961. For many years her legal matters were handled by Attorney John Elliott, who was paid an annual retainer. In 1959 she discussed with Frank Mayne, vice-president of the bank, the question of making gifts in trust and she told him she wanted to create a trust for her grandchildren. Several conferences followed in which her attorney Elliott participated, and on January 7, 1960, the trust was executed by the settlor in the presence of both Elliott and Mayne.

In the summer of 1961 the settlor discussed with Mayne the matter of gifts in trust to her son and daughter, and several alternative plans were prepared by the bank. At that time she decided to employ Attorney Boyd Goldsworthy who had long known the son Richard and had done legal work for him through the years to draw the trusts. The documents were completed by November and sent to the settlor to study them. She gave them to both Claresa and Richard to examine and discuss, and on January 15, 1962; some six months after they were first discussed, the settlor signed them, in the presence of Mayne and Goldsworthy. The settlor died February 19, 1964, of arteriosclerosis. The appellant had received benefits

from her trust for some two years after it was created but in April of 1963 began to question the bank's investment policy. Her demands for a change of investments became so insistent that on November 20, 1964, the bank filed its complaint herein to have its actions confirmed.

In support of her counterclaim to have the trusts set aside the appellant argues that a fiduciary relationship existed between the bank and the settlor, that the latter was in a senile condition and did not understand the trusts, and that the bank "secured" the trusts through a presumed exercise of undue influence. It is asserted that the settlor did not have independent advice in private, and the proposition is advanced that in order to avoid a finding of undue influence under the present circumstances it must be shown that the donor privately consulted a competent, independent adviser.

We are aware of no rule of law which deems the transfer fraudulent whenever there has been no private consultation with an independent adviser. Whether the settlor had independent legal advice is merely one of several factors which may be important in determining the fairness of a transfer. The correct rule, where a fiduciary relationship exists, is that a transfer will be deemed presumptively fraudulent when the dominant party has profited at the expense of the dependent party. (*Boryca* v. *Parry*, 24 Ill. 2d 320.) In such cases the fiduciary has the burden of proving the transaction was fair and did not proceed from undue influence. (*Turner* v. *Black*, 19 Ill. 2d 296.) And as we have heretofore pointed out "Important factors in determining whether a particular transaction is fair include a showing by the fiduciary: (1) that he made a free and frank disclosure of all the relevant information he had; (2) that the consideration was adequate; and, (3) that the principal had competent and independent advice before completing that transaction." *Works* v. *McNeil*, 1 Ill. 2d 47, 52.

In the case at bar it is undisputed that the only gain or benefit to be realized by the trustee is its fee for administering the trust, and the first question that arises is whether this kind of "benefit" is sufficient to give rise to the presumption. The law in this State is that under such circumstances there is no presumption. The mere fact than an attorney or confidential agent who writes the will is named executor and trustee, to be compensated as such, does not alone raise a legal presumption of undue influence. He must receive a substantial benefit as a legatee or beneficiary. (*Turner* v. *Black,* 19 Ill.2d 296; *Gilbert* v. *Oncale,* 371 Ill. 427.) In *Compher* v. *Browning,* 219 Ill. 429, the confidential agent of an aged testatrix drew her will, or procured it to be drawn, and was made an executor and trustee thereunder. It was held (219 Ill. at 438-439) that the rule under which undue influence is inferred from a confidential relation has no application where the fiduciary takes nothing under the will, but was merely to be compensated for his services as such. He is not to be regarded as taking beneficially within the meaning of the rule but only as accepting duties thereunder. Where the fiduciary is benefited by the transaction he has the burden of showing its fairness, but if he merely drafts the instruments and is to act as trustee, the presumption does not apply. The party seeking to set aside the instruments must prove by a preponderance of the evidence that it was in fact the result of undue influence. *Williams* v. *Ragland,* 307 Ill. 386.

This the appellant has failed to do. Her claim that the trusts were "procured" by the bank out of self-interest finds no support whatever, nor are the repeated references to the settlor as a "senile donor" substantiated by the evidence. Her physical and mental condition described by some 28 witnesses, including her family physician, social friends, employees and fellow board members of the bank, and others was found adequate to enable her to understand the trusts, and such finding is amply sustained by the testimony. It is not necessary that a person setting up a

trust be able to explain every technical term used in the instrument. *Pernod* v. *American Nat. Bank & Trust Co.* 8 Ill.2d 16, 21.

Other points which appellant seeks to make are also without merit. Despite counsel's urging to the contrary, there is little evidence from which it could be inferred that the attorney Goldsworthy represented anyone other than the settlor, who was billed for his services and paid the fee. And as the trial court expressly found, there is nothing to show that a conspiracy or plan existed on the part of the son, Goldsworthy and Mayne to cause the dismissal of Elliott as Mrs. Meyer's attorney.

There is no need to unduly extend this opinion by discussing evidence item by item, as the parties have largely done throughout almost 400 pages of brief and argument. It is clear on this record that the basic idea for these trusts was initiated by the settlor, not by the trustee, and she established them only after deliberation and study over an extended period of time. Moreover there is nothing whatever to indicate she subsequently expressed dissatisfaction with any of them.

The trial court heard the evidence in this case, embodied in over 2000 pages of testimony and several hundred exhibits, and its conclusions were unanimously sustained by the appellate court. It is a well-established rule, too familiar to need citations, that where a case is heard by the chancellor and the evidence is oral, entirely or in part, his decree will not be reversed unless it is against the manifest weight of the evidence, or unless there is clear and palpable error in some other respect. The trial court having heard and observed the witnesses is in a better position than is a court of review to decide what weight should be given their respective testimony.

The Third District Appellate Court was correct in affirming the decree, and its judgment will be affirmed accordingly.

Judgment affirmed.

APPENDIX D

Letter from Clerk of Supreme Court of Illinois Setting Forth Order of July 17, 1969

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
SPRINGFIELD
62706

July 17, 1969

COPY

Messrs. King, Robin,
Gale & Pillinger
Attorneys at Law
135 South LaSalle Street
Chicago, Illinois 60603

In re: Claresa F. Armstrong Brown, appellant,
vs. Commercial National Bank of Peoria,
etc., et al., appellees, No. 41515

Gentlemen:

The Supreme Court today made the following announcement concerning the above entitled cause:

"The motion by appellant to recall mandate and to reconsider the order denying petition for rehearing is denied. That part of the motion to recall and stay the mandate pending disposition of petition for writ of certiorari in the Supreme Court of the United States is allowed."

Chief Justice Roy J. Solfisburg, Jr., and Justices Ray I. Klingbiel and Robert C. Underwood took no part in the consideration of this motion.

We are today recalling the mandate from the Clerk of the Appellate Court, Third District.

Very truly yours,

JT:gn
Clerk of the Supreme Court
cc--Attys. Kavanagh, Scully, etc.
cc--Attys. Davis, Morgan & Witherell
cc--Atty. Harry B. Hoffman

APPENDIX E

12 U.S.C.A. § 73

§ 73. *Oath*

Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated, any of the provisions of this chapter, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this chapter, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. . . . The oath, subscribed by the director making it, and certified by the notary public or other officer, before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency and shall be filed and preserved in his office for a period of ten years.

APPENDIX F

Illinois Revised Statutes, 1967

Ch. 120, § 499. *Property subject to taxation.*] § 18. The property named in this section shall be assessed and taxed except so much thereof as may be, in this act, exempted: . . .

Third: The shares of capital stock of banks and banking companies doing business in this state.

Ch. 120 § 557. *Listing and valuing stock of State and National banks.*] § 76. The stockholders of every kind of incorporated bank located within this State, whether such bank has been organized under the banking law of this State, or of the United States, shall be assessed and taxed upon the value of their shares of stock therein, . . . Such shares shall be listed and assessed with regard to the ownership and value thereof as they existed on the first day of April annually, . . .

Ch. 120 § 584. *Publication in counties of less than 500,000—Fees.*] § 103. In counties containing less than 500,000 inhabitants, as soon as the county assessor, supervisor of assessments or board of assessors, as the case may be, has completed the assessment in the county or in the assessment district he or it shall, . . . publish for such county or assessment district a full and complete list of the assessment of real and personal property, by townships if the county be so organized. . . . Such publication shall be made on or before July 10, of that year in counties with less than 150,000 inhabitants and on or before August 10, of that year in counties with 150,000 or more but less than 500,000 inhabitants, and shall be printed in some public newspaper or newspapers published in said county; or shall be mailed to every person in that township, or in counties not under township organization, in that county paying taxes upon personal property: Provided, that in every township or assessment district in which there is published one or more newspapers of general circulation,

the list of such township shall be published in one of said newspapers. . . .

Ch. 120 § 585. *Publication in counties of 500,000 or more.*] § 104. In counties containing 500,000 or more inhabitants, the county assessor in each year shall publish the assessment of personal property in full as soon as such assessment has been completed in the manner as is provided in this Section. . . .

In such counties, or assessment districts therein, the publication of the assessments of personal property and real estate or the changes therein required in this Act to be published, shall be printed in some newspaper or newspapers of general circulation published in the county except that, in every township or incorporated town which has superseded a civil township, in which there is published one or more newpapers of general circulation, the assessment list of such townships shall be published in one of such newspapers and in cities of more than 500,000 population the assessment list of such city shall be published in one or more newspapers of general circulation located within such city.